IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2006-0327
Appellee,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
WESTLEY NAT LEWIS,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20052560

Honorable Frank Dawley, Judge Pro Tempore

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Kathryn A. Damstra — Tucson
Attorneys for Appellee

Gail Gianasi Natale — Phoenix
Attorney for Appellant

E S P I N O S A, Judge.

¶1 Appellant Westley Nat Lewis was indicted for second-degree burglary and theft by control. A jury found him guilty of the burglary charge but acquitted him of theft. After finding he had three historical prior felony convictions and had committed the present

offense while on probation, the trial court sentenced him to an enhanced, presumptive prison term of 11.25 years.

¶2 In the single issue raised on appeal, Lewis contends the trial court erred as a matter of law in refusing to instruct the jury on the elements of criminal trespass as a lesser-included offense of second-degree burglary.[1] He mistakenly claims that, because the jury acquitted him of theft, it must necessarily have found that he had not "inten[ded] to commit any theft or any felony" when he unlawfully entered the victims' house, thereby eliminating an essential element of second-degree burglary. *See* A.R.S. § 13-1507(A); *State v. Bottoni*, 131 Ariz. 574, 575, 643 P.2d 19, 20 (App. 1982) ("Burglary does not require the successful completion of the underlying felony," and acquittal of underlying charge does not necessitate acquittal of burglary.).

¶3 We will not disturb a trial court's refusal to give a requested jury instruction unless the court has clearly abused its discretion, *State v. Lopez*, 209 Ariz. 58, ¶ 10, 97 P.3d 883, 885 (App. 2004), and we "review de novo whether the proffered instruction correctly stated the law." *Id.* The instruction at issue stated:

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[1]Second-degree burglary is defined in A.R.S. § 13-1507(A) as follows: "A person commits burglary in the second degree by entering or remaining unlawfully in or on a residential structure with the intent to commit any theft or any felony therein."

First-degree criminal trespass is defined in A.R.S. § 13-1504(A)(1) and (2), which provides: "A person commits criminal trespass in the first degree by knowingly . . . [e]ntering or remaining unlawfully in or on a residential structure . . . or in a fenced residential yard."

> The crime of Burglary in the Second Degree includes the less serious crime of First Degree Criminal Trespass. You may find the defendant guilty of the less serious crime only if you find unanimously the State has failed to prove the more serious crime beyond a reasonable doubt but has proved the less serious crime beyond a reasonable doubt.

As authority for the requested instruction, Lewis cited *State v. Engram*, 171 Ariz. 363, 831 P.2d 362 (App. 1991).

¶4 The jury in *Engram* had been instructed that "[t]he crime of burglary in the second degree includes the less serious crime of criminal trespass in the first degree." Having apparently misunderstood the court's instructions, the jury found Engram guilty of both second-degree burglary and first-degree criminal trespass, in addition to theft. The trial court had promptly vacated the guilty verdict on the trespass count, "realiz[ing] that a defendant cannot be convicted for both a greater and a lesser included offense" without violating the prohibition against double jeopardy. *Engram*, 171 Ariz. at 365, 831 P.2d at 364; *see also Brown v. Ohio*, 432 U.S. 161, 168, 97 S. Ct. 2221, 2227 (1977).

¶5 On appeal, Division One of this court ruled that the trial court had correctly resolved the problem created "[w]hen the jury [had] returned verdicts on both the greater and the lesser offenses" by dismissing the lesser offense and leaving the conviction for burglary intact; thus, it held, the defendant was not entitled to reversal or a new trial. *Engram*, 171 Ariz. at 366, 831 P.2d at 365. Without discussion, analysis, or citation of authority, Division One simply assumed and stated that "[t]he charge of criminal trespass was a lesser included offense of second-degree burglary." *Id.* at 363, 831 P.2d at 364.

¶6 In fact, however, our supreme court has held otherwise, ruling in *State v. Malloy*, 131 Ariz. 125, 131, 639 P.2d 315, 321 (1981), that "[c]riminal trespass is not necessarily a lesser included offense of burglary" because the former contains an additional element—the defendant's knowledge that his entry into or continued presence in a residential structure was unlawful—that the offense of burglary does not. *Accord State v. Kozan*, 146 Ariz. 427, 429, 706 P.2d 753, 755 (App. 1985); *State v. Ennis*, 142 Ariz. 311, 314, 689 P.2d 570, 573 (App. 1984); *State v. Thompson*, 139 Ariz. 133, 135, 677 P.2d 296, 298 (App. 1983); *State v. Mitchell*, 138 Ariz. 478, 480, 675 P.2d 738, 740 (App. 1983).

¶7 Even assuming *arguendo* that Lewis and Division One in *Engram* were correct that criminal trespass is a lesser-included offense of second-degree burglary, the trial court still did not abuse its discretion by refusing to give Lewis's requested instruction, given the particular facts of this case.

> Once an offense has been shown to be a lesser-included offense then it must also be shown that the facts support giving the instruction. The facts support giving the instruction when . . . the jury could rationally find that the state has failed to prove an element of the greater offense. That element must be one that is required to convict of the greater but not of the lesser offense and it must necessarily distinguish the greater offense from the lesser.

Mitchell, 138 Ariz. at 480, 675 P.2d at 740; *accord State v. Gooch*, 139 Ariz. 365, 367, 678 P.2d 946, 948 (1984); *Ennis*, 142 Ariz. at 314, 689 P.2d at 573.

¶8 In declining to give Lewis's requested instruction, the trial court found as a matter of law that criminal trespass is not a lesser-included offense of burglary, based on the holding of *Ennis*, which applied *Malloy*. But the trial court also noted the evidence did not readily support Lewis's position.

¶9 As Lewis states in his opening brief, "Forensic evidence—three partial fingerprints and a DNA[2] match—indicated . . . that Mr. Lewis had been in contact with objects inside a Tucson apartment in March 2005 while the occupants were away." But, in addition, the victim testified that her bedroom had been ransacked by someone who had obviously been "going through [her] stuff" after having gained entry by breaking the bedroom window with a rock.

¶10 Among the items the burglar had disturbed was a piggy bank that the victim kept on her desk. After the burglary, the piggy bank was found lying on the floor of the victim's bedroom, missing the thirty to fifty dollars it had previously contained. Three fingerprints found on the piggy bank proved to be Lewis's. We thus agree with the state that, from this evidence, the jury could reasonably conclude Lewis had unlawfully entered the apartment with the intent to commit theft and thus had committed second-degree burglary.

¶11 Because all the elements of the charged offense were established by the evidence presented, the trial court could properly conclude that the jury could not rationally

[2]Deoxyribonucleic acid.

have found that Lewis had committed criminal trespass but had not committed burglary. Consequently, the trial court did not abuse its discretion in refusing to instruct the jury on the elements of criminal trespass as a lesser-included offense of burglary. *See Malloy*, 131 Ariz. at 129, 639 P.2d at 319 (lesser-included instructions proper if evidence would permit jury "rationally to find that although all the elements of the crime charged were not proved, all the elements of another or other lesser offenses had been"); *accord State v. Valenzuela*, 194 Ariz. 404, 406, 984 P.2d 12, 14 (1999).

¶12 For all the foregoing reasons, Lewis's conviction and sentence are affirmed.

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PHILIP G. ESPINOSA, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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GARYE L. VÁSQUEZ, Judge